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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

DAVID ANTOINE MCGUIRE et al.,

Defendants and Respondents.

F069095

(Super. Ct. No. BF144813A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Heather S. Gimle, Deputy Attorneys General, for Plaintiff and Appellant.

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Respondent David Antoine McGuire.

Michael Satris, under appointment by the Court of Appeal, for Defendant and Respondent Steven Anthony Molina.

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Defendants David Antoine McGuire and Steven Anthony Molina were arrested in 2012 for a murder committed 12 years earlier. In an amended complaint, defendants were charged with first degree murder and conspiracy to commit murder in violation of Penal Code sections 182, subdivision (a)(1), 187, subdivision (a), and 189, along with various gang and firearm related enhancements not relevant to this appeal. After the preliminary hearing, defendants moved to dismiss the charges based on the delay between the crime and the charges being brought against them, in violation of their right to due process under the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 7, of the California Constitution. The trial court granted defendants' motion to dismiss the charges and the People now challenge that ruling on appeal.

We reverse, without prejudice to defendants' renewal of the motion at a later stage in the proceedings supported by a more developed evidentiary record.

FACTUAL SUMMARY¹

In 2000, defendants were known members of the Eastside Crips. On the night of September 20, 2000, a large party was underway in Eastside Crip territory in Bakersfield. Henry Gibson, a Country Boy Crip, was playing dice outside with others. Although the two gangs were bitter rivals in 2000, Gibson apparently had a "pass" to be there. At approximately 8:40 p.m., Gibson was shot and killed.

Officers responding to the scene of the shooting recovered a gun, one brown right-handed glove, and one black left-handed glove thought to be possibly related to the shooting. No witnesses were willing or able to provide information on any suspects, however.

¹ The facts are summarized from the preliminary hearing testimony of Sergeant Heredia, Officer Riddle, Sergeant Stratton, and Detective Carruesco of the Bakersfield Police Department, along with portions of the police reports in the record.

Several officers who responded to the scene of the shooting to assist left after approximately 15 or 20 minutes to place a residence under surveillance a few blocks away on Hayes Street. There had been a previous call that night regarding someone in possession of a gun at that location and the prior month police investigated the location based on reports of subjects entering the residence with guns. While the residence was under surveillance, a car left the premises and officers pulled it over. Ray Stewart was driving, and Archie Weir, Jamar Scott, and defendant McGuire were passengers.² McGuire had one brown glove on him, partially visible in his back pocket, and Weir had dice in his pants pocket.³ They were questioned, searched, given their property, and released.

On the day of the shooting, an informant, later identified as Adam Maya, contacted the police and identified defendants as possibly being involved in the murder of Gibson.⁴ At the time officers pulled over the car in which defendant McGuire was a passenger, they were unaware that McGuire might have been involved in the shooting. Once defendants' possible involvement was known through Maya's tip, officers went back to the Hayes Street address sometime after midnight, where they found defendant Molina and two other people. Defendant Molina agreed to go to the police station to be interviewed. Stewart, Weir, Scott, and defendant McGuire were also located and brought to the police station for interviews.

No arrests were made in the Gibson shooting.

On December 30, 2000, during the course of his arrest and booking on unrelated matters, Charles Richards, Jr., an Eastside Crip, volunteered information regarding the shooting death of Gibson. Richards told Sergeant Heredia that he and Gibson drove to

² Ray Stewart is also referred to as Ray Steward.

³ Later on, officers returned to the spot they pulled the car over and found the brown glove discarded in the gutter. It was seized as evidence.

⁴ Adam Maya is also referred to as Adam Mya.

the party together that night and Gibson was playing dice. As Richards was urinating nearby with his back to the crowd, he heard shots, turned around, and saw someone running away. Richards said he saw “Super Dave” and “Clucks” talking nearby prior to the shooting and he saw “Clucks” running from the location of the shooting after it occurred.

No arrests were made.

Eleven years later, in the summer of 2011, Sergeant Stratton began to review the Gibson murder case during the course of his investigation into old cases that were unsolved. Months later, on November 19, 2011, Stratton was informed that an in-custody inmate, Ray Allen, an Eastside Crip associate, had information about the Gibson shooting. During an interview the next day, Allen stated he witnessed the shooting. Allen told Stratton that “Little Clucks,” identified by Allen via photograph as defendant Molina, was the shooter and “Super Dave,” identified by Allen via photograph as defendant McGuire, provided the gun just prior to the shooting. Allen also told Stratton that sometime between the 1996 murder of an Eastside Crip member named Rodney Sorriell and the 2000 murder of Gibson, a meeting occurred at Adam Maya’s residence concerning suspicion Gibson was involved in the murder of Sorriell. Allen said defendants were present at the meeting, along with Allen, Maya, and several other men. Allen further stated that Richards, who provided information about the shooting in December 2000, was present at the party on September 20, 2000, but Allen gave conflicting accounts regarding whether Richards left before or after the shooting. Allen additionally stated that Molina bragged in later years of killing Gibson.

Defendants were charged with Gibson’s murder in October 2012.

DISCUSSION

I. Standard of Review

“We review for abuse of discretion a trial court’s ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if

substantial evidence supports them [citation].” (*People v. Cowan* (2010) 50 Cal.4th 401, 431.) “Evidence, to be ‘substantial’ must be ‘of ponderable legal significance ... reasonable in nature, credible, and of solid value.’” (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) “‘Under the abuse of discretion standard, “a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’”” (*People v. Jones* (2013) 57 Cal.4th 899, 924.) While this standard is deferential, however, it “‘is not empty.’” (*People v. Giordano* (2007) 42 Cal.4th 644, 663.)

II. Dismissal of Charges Based on Precharging Delay

A. Due Process Violation Determined by Balancing Test

A defendant may be entitled under the federal and state Constitutions to the dismissal of criminal charges against him based on precharging delay, if the delay is prejudicial to his defense and there is no justification for the delay.⁵ (*People v. Cordova* (2015) 62 Cal.4th 104, 119, cert. den. (2016) __ U.S. __ [2016 U.S. Lexis 2594].) “‘The statute of limitations is usually considered the primary guarantee against bringing overly stale criminal charges,’ and there ‘is no statute of limitations on murder.’” (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) However, “the right of due process provides additional protection, safeguarding a criminal defendant’s interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.” (*People v. Jones, supra*, 57 Cal.4th at p. 921.) “‘A defendant seeking to dismiss a charge on [the ground of precharging delay] must demonstrate prejudice arising from the delay.’” (*People v. Nelson, supra*, at p. 1250.) If the defendant makes a

⁵ The right at issue has also been referred to in cases as prearrest or preaccusation delay. (E.g., *People v. Cowan, supra*, 50 Cal.4th at pp. 429–430; *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1328.)

showing of actual prejudice, the burden then shifts to the prosecution to offer justification for the delay. The trial court must then “balance[] the harm to the defendant against the justification for the delay.” (*Ibid.*) “Whether prearrest delay is unreasonable and prejudicial to the defendant is a question of fact,” (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911–912), and the trial court has the discretion to grant a motion to dismiss for precharging delay before, during, or after trial (*People v. Mirenda, supra*, 174 Cal.App.4th at p. 1330).

The analysis necessarily begins with prejudice, which is not presumed from delay and instead must be affirmatively shown. (*People v. Cordova, supra*, 62 Cal.4th at p. 119; *People v. Nelson, supra*, 43 Cal.4th at p. 1250.) “Prejudice may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.” (*People v. Catlin* (2001) 26 Cal.4th 81, 107.) If the defendant fails to show prejudice, the inquiry ends.

However, if the defendant meets his initial burden of demonstrating prejudice, the inquiry turns to justification and in evaluating justification for the delay, the standard under California law is applied because it “is at least as favorable for [the] defendant ... as the law under the United States Constitution.” (*People v. Cordova, supra*, 62 Cal.4th at p. 119.) “[U]nder California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process.” [Citation.] However, ‘whether the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.’ (*Id.* at pp. 119–120.) “Even a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. By the same token, the more reasonable the delay, the more prejudice the defense would have to show to require dismissal. Therein lies the delicate

task of balancing competing interests.” (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 915.)

B. Showing of Actual Prejudice

As to the first element, the trial court found defendants met their burden of showing actual prejudice through the deaths of witnesses. After holding a hearing on defendants’ motion, the court issued the following written ruling: “The court has considered the moving papers and argument of counsel. The defendants have shown actual prejudice by the death of witnesses. These witnesses include, but are not limited to, a potential alibi witness and a witness who on the day of the shooting indicated she may be able to identify the shooter but was never shown, for unknown reasons, a photographic lineup despite the fact the Bakersfield Police Department received information on the day of the murder and three months later that the defendants were involved in the murder. Actual prejudice was also shown by faded memories but to a much lesser degree.”

The People argue these findings are not supported by substantial evidence because there was no evidence the deceased witnesses were material and it was an abuse of discretion to rely on the arguments of the attorneys. We therefore briefly address the state of the record as an initial matter.

Defendants’ motion to dismiss was supported by the declaration of defendant McGuire’s trial counsel, who averred that the facts set forth were “derived entirely” from the Bakersfield Police Department’s reports produced to the defense by the prosecution. Some but not all of the police reports relied on were part of the record by the time the trial court heard the motion the dismiss, as they were attached to defendants’ discovery motion filed approximately two weeks later but set for hearing on the same day as the motion to dismiss. The prosecutor did not dispute the facts set forth in counsel’s declaration nor does the Attorney General now challenge them as inaccurate. Given that trial counsel’s declaration was sworn and it set forth facts derived entirely from police

reports produced to the defense by the prosecution, and since there was no objection to any of those facts by the prosecution, those facts are evidence. (*People v. Mirenda*, *supra*, 174 Cal.App.4th at pp. 1320, 1331–1332; *People v. Sahagun* (1979) 89 Cal.App.3d 1, 24; see *People v. Johnson* (2006) 38 Cal.4th 717, 731, fn. 13.) However, as the People contend, “‘unsworn statements of counsel are not evidence.’” (*People v. Wallace* (2004) 33 Cal.4th 738, 754, fn. 3.) The trial court also had the benefit of the previous preliminary hearing testimony.

Turning to defendants’ showing of prejudice, in the 12 years between the murder and defendants’ arrest, three witnesses died and two of those deaths were relied upon by the trial court in determining that defendants suffered actual prejudice to their ability to defend themselves. Jamar Scott, who died in 2005, was described as a potential alibi witness. Shortly after Gibson was shot at approximately 8:40 p.m., officers pulled over the car driven by Stewart. Defendant McGuire was in the front passenger seat while Scott and Weir were in the backseat. All four said they had been driving around and drinking, and they disclaimed any knowledge of a shooting. Stewart and Weir now assert they do not recall the events of that day, and Weir denies riding around in a car with defendant McGuire. Trial counsel argued that Scott was a potential alibi witness for defendant McGuire and his loss as a witness was all the more critical given Stewart’s lack of recall of that day and Weir’s denial he was in a car with McGuire. The trial court concurred, finding Scott was a potential alibi witness whose death caused defendants actual prejudice.

Defendants are required to affirmatively show prejudice. (*People v. Cordova*, *supra*, 62 Cal.4th at p. 119; *People v. Abel* (2012) 53 Cal.4th 891, 908–909; *People v. Nelson*, *supra*, 43 Cal.4th at pp. 1250–1251; *People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 911.) Defendant Molina cannot do so with respect to the death of Scott because Molina was not in the car with Scott and the others that night. With respect to defendant McGuire, Scott’s statement placed him in the car with McGuire at

approximately 9:00 p.m., at which time he was picked up while walking around. Defendant McGuire and Weir were already in the car with Stewart. Weir and Stewart are available as witnesses and their statements given to police the night of the shooting may still be used at trial for past recollections recorded or impeachment. (Evid. Code, §§ 1202, 1237.) Based on Scott's statement, which is the only evidence in the record regarding his potential materiality, he was the last person to be picked up and that occurred within the general area of the shooting approximately 15 to 20 minutes afterward. Given his very limited statement to police, casting him as an alibi witness is speculative at best. Indeed, the trial court referred to him as a potential alibi witness. However, Scott's statement did not place him in the company of defendant McGuire at the time of the murder or offer any other information suggesting an alibi for McGuire. Any argument that had he been alive, he might have testified to a timeline more favorable to the defense regarding McGuire's whereabouts at approximately 8:40 p.m. requires precisely what the actual prejudice showing prohibits: mere speculation. We therefore find the trial court's finding of actual prejudice due to the death of witness Jamar Scott is not supported by substantial evidence.

The next witness was Rochelle Dickerson. There were seven vehicles located within the immediate area of the crime scene. One of those vehicles was registered to Dickerson and parked just south of the location Gibson was shot. Dickerson was interviewed by the police. She had an argument with the shooter prior to the shooting and told police she could identify the shooter. However, despite the identification of defendants McGuire and Molina as possibly being involved by Maya on the day of the shooting and again by Richards three months later, Dickerson was apparently never shown a lineup and there is no further information in the record regarding what she saw or knew.

Trial counsel considered the loss of Dickerson to be the most significant and the trial court appears to have shared that concern. The lack of further information regarding

Dickerson is perplexing and we understand the trial court's concern on that point. However, Dickerson may have identified one or both of the defendants in a lineup or she may not have. As she is now deceased, it simply cannot be known whether she "would have supplied exonerating, rather than incriminating, evidence, or any evidence at all."⁶ (*People v. Cordova, supra*, 62 Cal.4th at p. 120.) While her death places the defense in a difficult position regarding their ability to make an affirmative showing of prejudice, the law precludes reliance on a presumption of prejudice or on speculative prejudice, which is all that has been shown at this juncture. (*People v. Cordova, supra*, 62 Cal.4th at p. 120; *People v. Nelson, supra*, 43 Cal.4th at pp. 1250–1251; *People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 911.)

The third witness, Adam Maya, died in 2008. On the day of the murder, Maya telephoned in a tip identifying defendants as having been involved in Gibson's murder. This tip led investigators to focus on defendants and, as the trial court recognized and defense counsel conceded, his unavailability due to his death actually benefitted the defense. While defendants are correct that his death prevents them from further exploring what he saw, heard, or said to others, his death did not cause them any actual prejudice with respect to their defense given his inculcation of them in the crime.

Finally, the trial court also found actual prejudice, although to a lesser degree, from memories faded by the passage of 12 years. The law recognizes there is prejudice inherent in lengthy delays due to the loss of evidence through faded memories, but it must be demonstrated. (*People v. Abel, supra*, 53 Cal.4th at pp. 908–909.) As with Jamar Scott, the faded memories of Ray Stewart and Archie Weir are of no assistance to defendant Molina. Regarding defendant McGuire, Stewart's statement to police placed

⁶ The purely speculative nature of what Dickerson might or might not have said or done if presented with a lineup is underscored by the identification of defendants as possibly having been involved by other witnesses or informants and by the purported presence of defendant McGuire's DNA on the gloves the prosecution contends are linked to the shooting.

him at his grandmother's house when Gibson was shot, as Stewart stated his grandmother received a phone call about the shooting while he was there. Nothing in his statement would support an inference McGuire was with him at that time.

At 1:30 a.m., when Weir was interviewed by police, he was not particularly forthcoming. Weir claimed he did not know the identities of the others in the car with him, he had been in the car for the past one or two hours, and he did not know anything about a shooting. The argument that Weir's "statement to the police placed him in the car with McGuire for as long as two hours before the police stop, well before the shooting" is not supported by the record. Weir was asked at 1:30 a.m. "what he had been doing the last several hours," and he responded "he had been with the others in the vehicle for the past one or two hours." While Weir stated he did not know what time it was, we do not find his statement to police susceptible to the interpretation that he was in the car with the others one to two hours before the original stop and well before the 8:40 p.m. shooting. Additionally, although years later Weir denied riding in a car with McGuire that night, even on the night of the shooting he claimed not to know the names of anyone in the car with him. Thus, the argument that the passage of time caused McGuire actual prejudice with respect to Weir lacks, at least at this time on the present record, a basis in fact. This conclusion does not foreclose the possibility that further proceedings may rectify this deficiency. (*People v. Mirenda, supra*, 174 Cal.App.4th at p. 1330.)

In sum, neither Stewart nor Weir provided an alibi for defendant McGuire, and the argument their faded memories caused McGuire any actual prejudice is purely speculative and does not suffice to satisfy McGuire's burden of affirmatively showing prejudice. (*People v. Jones, supra*, 57 Cal.4th at p. 923.)

In the absence of a showing of actual prejudice by defendants, the burden does not shift to the prosecution to justify the delay. (*People v. Jones, supra*, 57 Cal.4th at pp. 922, 924; *People v. Abel, supra*, 53 Cal.4th at p. 909.) However, we note the trial

court's determination the prosecution provided no justification for the delay is well supported by the record. Although the Attorney General argues the delay in this case was purely investigative, that argument is not persuasive on the record considered by the trial court, which found the prosecution failed to show "any justification whatsoever for the delay." (See *People v. Cordova*, *supra*, 62 Cal.4th at p. 120 [no evidence connected the defendant to 1979 murder until 2002 cold case DNA hit]; *People v. Cowan*, *supra*, 50 Cal.4th at pp. 428–429 [delay was entirely investigative where district attorney's office determined there was insufficient evidence to charge the defendant and approximately 10 years later, a recomparison of latent fingerprints linking the defendant to the crime provided sufficient evidence to charge him]; *People v. Mirenda*, *supra*, 174 Cal.App.4th at p. 1332 [delay in prosecuting the defendant unjustifiable where prosecutors did nothing in the case between the time they located the defendant out of state and his contact with them 15 years later to clear his warrant]; *People v. Nelson*, *supra*, 43 Cal.4th at p. 1256 [1976 murder solved in 2002, when DNA hit linked the defendant to crime]; *People v. Boysen* (2007) 165 Cal.App.4th 761, 781 [justification for delay unconvincing where what changed in 24 years was not the evidence but the prosecution's willingness to proceed].) Moreover, the prosecutor conceded the case had "languished" for 11 years.

Nevertheless, the prejudice element is dispositive and in the absence of a showing of actual prejudice, the burden does not shift to the prosecution to justify the delay. (*People v. Jones*, *supra*, 57 Cal.4th at pp. 922, 924; *People v. Abel*, *supra*, 53 Cal.4th at p. 909.) "[W]hile we defer to the sound exercise of discretion by a trial court, an exercise of discretion is only sound if it is reasonable under the applicable law and relevant facts." (*People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, 446.) Here, the trial court's finding of actual prejudice is not supported by substantial evidence and judgment must therefore be reversed. Our determination does not preclude the trial court from considering another motion to dismiss brought by defendants during or after trial, at

which time the evidentiary record will be better developed. (*People v. Mirenda, supra*, 174 Cal.App.4th at p. 1330.)

DISPOSITION

The judgment of dismissal is reversed. This case is remanded to the trial court for further proceedings.

KANE, Acting P.J.

WE CONCUR:

DETJEN, J.

PEÑA, J.